STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 17, 2003
V	No. 230423 Wayne Circuit Court
JERRY D. RAMSDEN, Defendant-Appellant.	LC No. 99-012442

Before: Gage, P.J., and Wilder and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of gross indecency between males, MCL 750.338, and sentenced to two years' probation. He appeals as of right. We affirm.

Defendant was convicted of performing oral sex on another male in a public restroom at a state highway rest area. Defendant's conduct was observed by two state police troopers who were able to observe the activity after they stood on an outside picnic table and looked into an open window, thereby enabling them to view the inside common area of the restroom.

I

Defendant first argues that the officers' conduct violated his rights under both the Fourth Amendment, US Const, Am IV, and the state constitution, Const 1963, art 1, § 11, and, therefore, the trial court erred in denying his motion to suppress the evidence of the officers' observations and dismiss the case. We disagree.

A trial court's decision on a motion to suppress evidence is reviewed de novo for all mixed questions of fact and law, and for all pure questions of law. *People v Powell*, 235 Mich App 557, 560; 599 NW2d 499 (1999). The court's factual findings are reviewed for clear error. *People v Zahn*, 234 Mich App 438, 445; 594 NW2d 120 (1999).

Defendant argues that the officers' violated his reasonable expectation of privacy. The record establishes that two female police troopers stood on top of a picnic table and looked into the men's restroom through an open window. The trooper who testified at the suppression hearing had witnessed illegal sexual activity in that restroom in the past, but had no evidence that illegal activity was occurring at that particular time. From the window, the trooper was only able

to observe the sides of the restroom stalls and the common areas of the restroom. The window, although eight or nine feet above the ground, did not provide an overhead view of the stalls.

From her position, the trooper first observed a codefendant push open a stall door. She saw that another man was already inside that stall because his feet were visible. The codefendant entered the stall. The codefendant was facing the inside of the stall, with his back side sticking out. The door to the stall was left open. The codefendant began moving his pelvic area back and forth. Something caught the codefendant's attention and he turned around. As the codefendant stood in the common area, he stroked his exposed penis. From her observations of the two men in the stall, the trooper concluded that the man who was originally inside the stall was performing oral sex on the codefendant.

After the codefendant left, defendant approached the same previously occupied stall, also leaving the door open. Only one person had left that stall, leading the trooper to believe that the other man still occupied the stall. Defendant got down on his knees within the stall, with his back side sticking out of the stall. From her observations, the trooper concluded that defendant was performing oral sex on the other man in the stall. At that point, defendant and the other two men were arrested.

Apart from her direct observations as described above, the trooper testified that she was also able to observe the activity inside the stall through a mirror in the common area directly in front of the stall. The trial court denied defendant's motion to suppress, concluding that defendant did not have a reasonable expectation of privacy with regard to his activities in the public restroom, but ruled that the officer could only testify to observations made without the aid of the mirror.

The first question that must be addressed when deciding any challenge under the Fourth Amendment is whether the defendant has standing to challenge the officers' conduct. *Powell, supra* at 561. The constitutional protections against unreasonable searches and seizures, US Const, Am IV, Const 1963, art 1, § 11, are personal and those rights may only be properly invoked by persons whose own protections were infringed by a search or seizure. Therefore, defendant must establish his standing to challenge the officers' conduct in this case. *Zahn, supra* at 446. The burden is on the defendant to establish standing and a court should consider the totality of the circumstances in deciding this question. *Powell, supra*.

Standing is determined by whether the defendant had an expectation of privacy in the place or object that was searched and whether that expectation is one that society recognizes as reasonable. *People v Lee Smith*, 420 Mich 1, 28; 360 NW2d 841 (1984); see also *Rakas v Illinois*, 439 US 128, 143; 99 S Ct 421; 58 L Ed 2d 387 (1978), and *People v Hunt*, 77 Mich App 590, 593; 259 NW2d 147 (1977).

This Court has previously considered whether a reasonable expectation of privacy exists in public restrooms. This Court has recognized that a limited expectation of privacy exists in public restrooms, but that that expectation generally extends only to the enclosed stall, not common areas. Thus, while surveillance devices over a bathroom stall have been found to be unreasonable, cameras used to monitor the common areas of a public restroom are not deemed unreasonable under the Fourth Amendment. See *People v Lynch*, 179 Mich App 63, 68-69; 445

NW2d 803 (1989); *People v Heydenberk*, 171 Mich App 494; 430 NW2d 760 (1988); *People v Kalchik*, 160 Mich App 40; 407 NW2d 627 (1987); *People v Dezek*, 107 Mich App 78, 84, 89-90; 308 NW2d 652 (1981); *People v Abate*, 105 Mich App 274, 275-276, 283; 306 NW2d 476 (1981).

In *Kalchik*, *supra* at 48-49, this Court explained:

> As noted by the *Dezek* panel, a bathroom stall, such as at issue herein, does not afford complete privacy, but an occupant of the stall would reasonably expect to enjoy such privacy as the design of the stall afforded, i.e., to the extent that defendant's activities were performed beneath a partition and could be viewed by one using the common area of the restroom, the defendant had no subjective expectation of privacy, and, even if he did, it would not be an expectation which society would recognize as reasonable. On the other hand, defendant did have an actual, subjective expectation that he would not be viewed from overhead. We find this expectation to be a reasonable one. Here, even though defendant's expectation of privacy may be only partial, it is nevertheless entitled to constitutional protection.

In *Heydenberk*, this Court upheld the use of video cameras in a men's public restroom at a highway rest area. One camera was installed under a sink and showed only the area under the sinks and the stalls. Anyone standing at the urinals was not visible. *Id*. at 495-496. A second camera was placed above the entrance to the bathroom and showed only the common areas within the restroom. *Id*. at 496. The defendant was caught on tape engaging in sexual acts in the common areas of the restroom by the camera placed over the main entrance. *Id*. This Court held that the defendant did not have a reasonable expectation of privacy when he was engaged in sexual activities in the area of the bathroom readily observable by anyone who entered the restroom. Any expectation of privacy was unreasonable on those facts. *Id*. at 498.

In a case factually similar to this case, *People v Lillis*, 181 Mich App 315, 316-318; 448 NW2d 818 (1989), this Court held that a police trooper did not act unreasonably where he first boosted himself up to look into the window of a public restroom at a highway rest stop. The trooper observed the defendant and another male engage in sexual activity in the common area of the restroom, outside of the stalls. *Id*. at 316. The trooper normally checked the restrooms when inspecting the premises as part of his regular patrol. *Id*. By looking into the window, the trooper could see the inside common area outside of the stalls, but not the urinals. *Id.* Because the trooper observed the defendant engaged in sexual activity in the common area of the restroom, the defendant had no reasonable expectation of privacy under the Fourth Amendment. *Id*. at 318.

The above cases demonstrate that, as applied to public restrooms, Fourth Amendment protections extend only to the enclosed stalls where a person using the stall would not expect his activities to be viewed by others. To the extent that a person using a public restroom performs acts visible from within the common areas of the restroom, he does not have a reasonable expectation of privacy.

In the case at bar, the troopers looked into a window that enabled them to observe the inside common areas of the restroom. The window was far enough away from the stalls, and the

sides of the stalls, that the troopers were no able to look directly into the stalls. Therefore, this case is distinguishable from the cases barring overhead video or surveillance equipment of the stall areas. Because the officers' testimony was based upon their observations of the common areas of the restroom, and because defendant does not have a reasonable expectation of privacy with respect to conduct observable from the common areas, trial court did not err in denying defendant's motion to suppress.

Defendant also argues that his expectation of privacy was further violated because the troopers involved were both female. We disagree. In *Lillis, supra* at 319, this Court held that even though the trooper had to hoist himself up to a window to observe the defendant in the common areas of the restroom, that did not have any bearing on the Fourth Amendment question. The Court stated:

> The manner by which Trooper Day observed defendant has no bearing on whether defendant had a reasonable expectation of privacy in the rest room's common area. The determination whether a defendant had a reasonable expectation of privacy in the area searched must be made without regard to the manner in which the area was searched. The constitutionality of the challenged police conduct may be examined only after a determination has been made that the defendant had a reasonable expectation of privacy in the area searched. [*People v*] *Smith,* [420 Mich 1, 28; 360 NW2d 841 (1984)]. [*Lillis, supra* at 318-319.]

We similarly conclude that defendant cannot challenge the use of troopers of the opposite gender to check the men's restroom unless the conduct at issue infringed upon an interest that is constitutionally protected. As discussed previously, defendant has failed to show that his constitutionally protected interests in the restroom were infringed. Accordingly, the fact that the troopers who observed defendant's activities were female does not afford a basis for relief. For this same reason, defendant also lacks standing to challenge the troopers' conduct on the basis that it allegedly violated the state's law against window peeping. MCL 750.167(1)(c).

II

Next, defendant argues that the evidence was insufficient to support a conviction for gross indecency between males and, therefore, trial court erred in denying his motion for a directed verdict. We disagree.

We review the trial court's decision de novo. *People v Hammons,* 210 Mich App 554, 556; 534 NW2d 183 (1995). An appellate court's review of the sufficiency of the evidence to sustain a conviction should not turn on whether there was any evidence to support the conviction, but whether there was sufficient evidence to justify a rational trier of fact in finding the defendant guilty beyond a reasonable doubt. *People v Wolfe,* 440 Mich 508, 513; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). The evidence must be reviewed in a light most favorable to the prosecution. *Id*. at 514-515. Both circumstantial evidence and reasonable inferences drawn from the evidence may be sufficient to prove the elements of a crime. *People v Whitehead,* 238 Mich App 1, 14; 604 NW2d 737 (1999).

MCL 750.338 prohibits the following conduct:

> Any male person who, in public or in private, commits or is a party to the commission of or procures or attempts to procure the commission by any male person of any act of gross indecency with another male person shall be guilty of a felony[.]

An act of fellatio between two males, committed in a public place, violates MCL 750.338 as an act of gross indecency. *People v Lino*, 447 Mich 567, 571, 576; 527 NW2d 434 (1994).

Viewed in a light most favorable to the prosecution, the trooper's testimony regarding her observations of defendant's conduct in the open restroom stall, and the circumstances surrounding that conduct, was sufficient to enable a rational trier of fact to conclude beyond a reasonable doubt that defendant was performing oral sex on another male in a public place. The trial court did not err in denying defendant's motion for a directed verdict. Contrary to what defendant argues, the record does not indicate that the trooper violated the court's suppression order which precluded the trooper from testifying about observations made only with the aid of the mirror.

III

Defendant also argues that the trial court erred by allowing the trooper to offer opinion testimony that defendant was engaged in sexual activity. We disagree. The testimony was admissible under MRE 701, which allows a lay witness to offer testimony in the form of an opinion or inference when the testimony is rationally based on the witness' perception of an incident and is helpful to either a clear understanding of the witness' testimony or relevant to an issue of fact. *Co-Jo, Inc v Strand*, 226 Mich App 108, 116; 572 NW2d 251 (1997); *People v Hanna*, 223 Mich App 466, 475; 567 NW2d 12 (1997); *People v Daniel*, 207 Mich App 47, 57; 523 NW2d 830 (1994). The trial court did not abuse its discretion in allowing the testimony. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994).

IV

Defendant also argues that MCL 750.338 is unconstitutionally vague. Because defendant did not challenge the constitutionality of the statute in the trial court, he must show a plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 761-767; 597 NW2d 130 (1999).

In *People v Beam*, 244 Mich App 103, 105; 624 NW2d 764 (2000), this Court, quoting *People v Noble*, 238 Mich App 647, 651-652; 608 NW2d 123 (1999), observed:

> A statute may be challenged for vagueness on three grounds: (1) that it is overbroad and impinges on First Amendment freedoms, (2) that it does not provide fair notice of the conduct proscribed, and (3) that it is so indefinite that it confers unstructured and unlimited discretion on the trier of fact to determine whether the law has been violated. . . . To give fair notice, a statute must give a person of ordinary intelligence a reasonable opportunity to know what is

> prohibited or required. The statute cannot use terms that require persons of ordinary intelligence to guess its meaning and differ about its application. A statute is sufficiently definite if its meaning can fairly be ascertained by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meanings of words.

Here, defendant does not allege that the statute impinges on any conduct protected by the First Amendment. Therefore, any claim that the statute is overbroad in that regard is waived. *Great Lakes Division of Nat'l Steel Corp v City of Ecorse*, 227 Mich App 379, 422; 576 NW2d 667 (1998).

While defendant is correct that the appellate courts of this state have not articulated an all-inclusive definition of "gross indecency," see *People v Bono (On Remand)*, 249 Mich App 115, 119-121; 641 NW2d 278 (2002); *People v Drake*, 246 Mich App 637, 641; 633 NW2d 469 (2001), our Supreme Court in *Lino, supra* at 572, 575-578, held that MCL 750.338 was not unconstitutionally vague where the defendant engaged in fellatio with another male in a truck. The Court rejected the defendant's constitutional challenge because many cases had held that MCL 750.338 encompasses public acts of fellatio between males. Accordingly, the Court concluded that the defendant had fair notice that his conduct was prohibited by the statute. The Court further concluded that the statute did not create a risk of arbitrary and discriminatory enforcement. *Id*. at 576.

Where a statute has been previously interpreted and applied to a certain set of facts, a defendant cannot claim that he was not fairly warned of the proscribed conduct for factually identical conduct. *Id*. at 577. Because defendant's conviction was based on his having committed an act of fellatio with another male in a public place, similarly, he cannot establish a plain, constitutional error. See *Lynch, supra* at 65-66; see also *People v Austin*, 185 Mich App 334, 336, 339; 460 NW2d 607 (1990) (prior decisions provided the defendant with notice that consensual acts of fellatio and masturbation in a public restroom were prohibited by MCL 750.338).

V

Defendant also argues that the trial court should have sua sponte dismissed this case on the basis that the troopers did not have probable cause to look into the men's restroom and, therefore, their conduct amounted to an illegal search. Because defendant did not raise this issue in the trial court, we review the issue for plain error affecting defendant's substantial rights. *Carines, supra*.

As discussed in part I of this opinion, the Fourth Amendment's protection against unreasonable searches and seizures, US Const, Am IV, first requires a defendant to show that he has standing based upon a legally protected interest in the place or object searched. *Zahn, supra* at 446. Because we have concluded in part I that defendant did not have a reasonable expectation of privacy, defendant cannot establish plain error predicated on the troopers' conduct. See also *People v Taylor*, 253 Mich App 399, 404; 655 NW2d 291 (2002), slip op at 3 (because the Fourth Amendment protects people as opposed to places or areas, "a search for purposes of the

Fourth Amendment occurs when the government intrudes on an individual's reasonable, or justifiable, expectation of privacy").

VI

Next, defendant argues that MCL 750.338 was selectively enforced against him, depriving him of equal protection under the law. We disagree. Because defendant did not raise this issue below, he must show a plain error affecting his substantial rights. *Carines, supra*.

Under both the state and federal constitutions, equal protection of the law is guaranteed. US Const, Am XIV; Const 1963, art 1, § 2. The guarantees under both constitutions afford similar protections. *In re Hawley*, 238 Mich App 509, 511; 606 NW2d 50 (1999). The Equal Protection Clause requires that persons under similar circumstances be treated alike; it does not require that persons under different circumstances must be treated the same. *Id*.

Three different statutes prohibit gross indecency between males, between females, and between a male and a female, respectively. See MCL 750.338, 750.338a and 750.338b. Defendant argues that these statutes are selectively enforced.

A prosecution may violate the Equal Protection Clause if the following standards are satisfied:

> First, it must be shown that the defendants were "singled" out for prosecution while others similarly situated were not prosecuted for the same conduct. Second, it must be established that this discriminatory selection in prosecution was based on an impermissible ground such as race, sex, religion or the exercise of a fundamental right. [*In re Hawley*, *supra* at 513, quoting *People v Ford*, 417 Mich 66, 102; 331 NW2d 878 (1982).]

Here, the record does not support defendant's claim that others similarly situated were not prosecuted for the same conduct. There was testimony that sexual activity in the men's restroom was a problem at this particular rest area, but there was no testimony that a similar problem existed with the women's restroom. The record also does not contain any evidence that females were observed engaging in public sexual activity in the women's restroom and were not arrested or prosecuted. Accordingly, we find no merit to defendant's argument that the troopers improperly singled him out by failing to investigate the women's restroom on the night defendant was arrested, or that he was selectively prosecuted because females committing the same acts were not prosecuted. Furthermore, although defendant maintains that there are more published appellate decisions addressing MCL 750.338, rather than the other gross indecency statutes, that does not establish that he was singled out for prosecution. Thus, a plain error has not been shown.

VII

Defendant next claims that his trial attorney was ineffective. Because defendant did not raise this issue in a motion for a new trial or request for an evidentiary hearing in the trial court,

our review of this issue is limited to mistakes apparent on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

In order for this Court to reverse due to ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant that he was denied the right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). The defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino,* 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, the defendant must show that there is a reasonable probability that, but for his counsel's error, the result of the proceeding would have been different. *People v Johnnie Johnson, Jr,* 451 Mich 115, 124; 545 NW2d 637 (1996). The burden is on the defendant to produce factual support for his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant first argues that his attorney was ineffective for not requesting a preliminary examination because, had he done so, he could have developed the record to argue whether the troopers had probable cause to look into the restroom. In the alternative, defendant argues that his attorney should have requested an evidentiary hearing on the issue of probable cause. As previously discussed in parts I and V of this opinion, however, because defendant did not have a reasonable expectation of privacy with regard to his conduct in the open stall of the public restroom, he does not have standing to challenge the troopers' conduct. Therefore, defendant cannot establish prejudice and counsel was not ineffective for not pursuing this issue below. *Pickens, supra*.

Defendant also appears to argue that his attorney was ineffective for failing to object to the trial testimony of one of the troopers that allegedly violated the trial court's pretrial suppression order. We are satisfied from our review of the record, however, that the suppression order was not violated. Thus, defendant has not shown that trial counsel was ineffective for failing to object. *Pickens, supra*.

Defendant also argues that his attorney was ineffective for not moving for a new trial based upon the great weight of the evidence. We disagree. The verdict in this case was not against the great weight of the evidence, so counsel was not ineffective for failing to bring such a motion. *People v Darden,* 230 Mich App 597, 605; 585 NW2d 27 (1998).

Defendant also argues that his attorney was ineffective for not challenging MCL 750.338 on the grounds of equal protection, overbreadth and vagueness. As already discussed in parts IV and VI of this opinion, these constitutional challenges lack merit. Accordingly, counsel was not ineffective for failing to raise them. *Darden, supra*.

Defendant has not shown that he was denied the effective assistance of counsel.

VIII

Finally, because defendant has not established a single error, he cannot establish that he was denied a fair trial due to the cumulative effect of multiple errors. *People v Daoust,* 228 Mich App 1, 16; 577 NW2d 179 (1998).

Affirmed.

/s/ Hilda R. Gage
/s/ Kurtis T. Wilder
/s/ Karen M. Fort Hood